IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 70 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DALWADI DANA MANSANG

Versus

STATE OF GUJ

Appearance:
MR VIJAY H PATEL for Petitioners
MR RAVAL APP for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE R.P.DHOLAKIA

Date of decision: 17/04/2001

C.A.V. JUDGEMENT

(Per : MR.JUSTICE R.P.DHOLAKIA)

1. The judgement and order of conviction and sentence passed by the learned Sessions Judge, Surendranagar in Sessions Case No.27 of 1991 dtd. 14th

October, 1991 is the subject matter of challenge in the present appeal, wherein the appellants were tried for the offences punishable under Section 302 read with Sections 323, 325, 326 and 114 of the Indian Penal Code and at the end of the trial, the present appellants original accused were found guilty and the learned Sessions Judge has convicted the appellants - original accused for the aforesaid offences and awarded rigorous imprisonment for life and the accused - present appellants were also directed to pay a fine of Rs.2000/- each. However, no separate sentence has been passed under Sec.323, 325, and 326 of the Indian Penal Code. Being aggrieved by the aforesaid judgement and order, the present appeal is preferred by the appellants original accused.

2. Short facts of the prosecution case may in brief be stated.

That there was a well in the field of Ranchhodbhai Virabhai, and he, accused No.1 and other persons were co-owners of the said well, and they were fetching water on time sharing basis. There was a Submersible Pump for fetching water from the well, which was of ownership of Ranchhodbhai Virabhai. As the said well was of co-ownership, all the concerned persons were fetching water turn-by-turn and Ranchhodbhai Virabhai was charging Rs.10/- per hour for fetching water, through the Submersible pump. That on 17/11/1990 in the morning, Ranchhodbhai, Laljibhai and his son had gone to their field for pouring water to the crops and they returned (for lunch) and thereafter at 3.00 O'clock at noon, they again went to their field. Bhagvanbhai Karshanbhai who happens to be the nephew of Ranchhodbhai, was loading Manure from his house in the evening hours on the said day for unloading the same to his field. At that point of time, Rabari Jesing Ranchhodbhai had come and told that his uncle and brother had gone to the field and the accused had also gone to their field, which is situated adjoining to his field, and he told Bhagvanbhai to go to the field. Hence, Bhagvanbhai Karshanbhai went towards the field at about 6.30 p.m. When he reached the Paniyari Talavidi, he saw that Ranchhodbhai and Laljibhai were coming and the accused were coming on bicycles from their field. The Accused No.1 told Ranchhodbhai that the well is of co-ownership and asked him why was he fetching water alone. Saying so, the accused NO.1 assaulted with an axe on the neck, accused No.2 assaulted with the Spade on the head, accused No.3 assaulted with Dhariya and accused NO.4 assaulted with stick. All the accused assaulted with their weapons on the head and neck of the Ranchhodbhai. Accused No.2 also assaulted Laljibhai with

spade. All the four accused had assaulted Laljibhai and Bhagvanbhai and on account of serious injuries, Ranchhodbhai fell down and died on the spot. Laljibhai and Bhagvan were shifted to the hospital and were given treatment at Limbadi. Thereafter, Laljibhai was referred to Ahmedabad for further treatment. Bhagvanbhai lodged complaint regarding the said incident with Chuda Police Station on 17/11/1990 at about 11.00 p.m. which was registered as CR NO.I-115 of 1990. Upon the said complaint, the investigating officer, started investigation and during the course of investigation, the investigating officer arranged for post-mortem of the deceased, also arranged for treatment of other injured persons, recorded statements of various witnesses, collected evidence, prepared various Panchnamas including Inquest Panchnama, Panchnama of Scene of Office, Recovery Panchnama etc. and also sent muddamal to FSL for analysis. After receiving report of the FSL, report of the Post-mortem and injury certificate of the Doctor, for the injuries sustained by the injured persons, and after recording the statements of various persons, the police arrested the accused and sent them into the judicial custody. After investigation, the police submitted chargesheet against the appellants original accused. As the accused committed offences punishable under Sections 302, 323, 325, 326, and 114 of the Indian Penal Code, which are Sessions Triable, the leaned Judicial Magistrate, (F.C.), Limbadi committed the case to the Sessions Court, Surendranagar, which was registered as Sessions Case No.27 of 1991. Thereafter, the learned Sessions Judge, framed charges against the present appellants - original accused (Ex.3) on 8/5/1991 and the present appellant original accused pleaded not guilty and prayed for trial, and therefore, the case was tried before the Sessions Court, Surendranagar, where the prosecution examined various witnesses and also produced documentary evidence. When the prosecution submitted closing purshish, the learned Sessions Judge recorded further statement of the accused - present appellants under Section 313 of the Criminal Procedure Code. After considering the documentary as well as oral evidence adduced by the prosecution and hearing the learned advocates appearing for the respective parties, the learned Sessions Judge came to the conclusion that the accused present appellants were found guilty of the charges levelled against them and imposed sentence as referred to above, against which the present appeal is filed by the appellants original accused.

3. We have heard the learned counsel Mr. Vijay Patel, appearing for the appellants and learned APP

Mr.Raval appearing for the respondent State.

4. The learned counsel for the appellants Mr. Patel has mainly argued that there is delay in filing the FIR and the delay has not been satisfactorily explained by the prosecution and that time has been consumed by the prosecution for the purpose of involving all the accused with the crime in question. He has also argued that the the trial court has mainly relied on two eye witnesses namely Bhagvanjibhai and Laljibhai who happen to be the nephew and son of the deceased and there are many contradictions, omissions and improvements in their evidence. It is submited that there are glaring serious infirmities in the evidence of the above two witnesses. That except the evidence of the said two witnesses, there is no other satisfactory evidence on record to connect the appellants with the commission of crime. It is urged that the trial court ought not to have relied upon the evidence of the said two witnesses and the appellants could not have been convicted only on the basis of their evidence.

5. The learned counsel for the appellants has further argued that there are inconsistencies in the direct evidence and medical evidence the injuries could not have been caused by the weapons in question.

6. He has further argued that the accused No.2 Daya Dana has also received serious injury and which has not been explained by the prosecution.

7. He has further argued that most of the panchas have not supported the case of the prosecution and the prosecution has also not properly proved the recovery and discovery panchnamas, panchnama of scene of offence through the investigating officer.

8. He has further argued that at the most it might be a case of free fight between the groups and therefore, it will not be a case of individual liability and, therefore, Sec.34 or 114 of IPC will not be applicable. Submitting accordingly, the learned counsel for the appellant submits that the prosecution has failed to prove the case against the appellants - original accused and, therefore, the appellants are required to be acquitted.

9. On the other hand, the learned APP Mr. Raval has argued that the prosecution has produced ample evidence against the accused by way of oral evidence of two injured witnesses namely Bhagvabhhai and Laljibhai and

merely because they are nearest relatives of the deceased, their evidence cannot be discarded and conviction can be based only on their evidence.

10. He has further argued that the recovery Panchnama and other panchnamas have been proved by the prosecution through the Investigating Officer and, therefore, the court below has rightly held that oral testimony gets corroboration from other evidence. He has also argued that the motive is also established and previous incident has also taken place in the present case, and therefore, the story put forward by the prosecution is trustworthy and it has been proved beyond reasonable doubt and the impugned judgement is a well reasoned judgement, and, therefore, the conviction and sentence imposed by the learned Sessions Judge is required to be confirmed and the appeal be dismissed.

11. We have heard the learned counsel appearing for the respective parties. We have also gone through the oral and documentary evidence, which have been shown to us and which have been read over and relied upon by the learned counsel for the respective parties. As per the record, to prove the guilt against the accused, the prosecution has in all examined 28 witnesses out of which 5 witnesses are Doctors who have examined and treated the injured and also performed the post-mortem of the deceased Ranchhodbhai and there are witnesses who are Panch Witnesses. But most of the panch witnesses have not supported the case of the prosecution and have been declared hostile as requested by the prosecution. They have been permitted to be cross examined but nothing has come out from their cross-examination also. There are other eye witnesses, out of which three witnesses namely [1] Hargovind Anandrav Maharaj known as Hargoavan Maharaj (PW 5) [2] Mohanbhai Ghelabhai (PW 6) and [3] Devubhai Alekhbhai (PW 7), have also not supported the case of the prosecution. Hence they have been declared hostile and nothing has been come out from their cross examination also. Therefore, their evidence is also not helpful to the prosecution. In short the whole case of the prosecution is based only on the two eye witnesses i.e. complainant PW 1 - Bhagvanbhai Karshanbhai and PW 4 Laljibhai Ranchhodbhai and according to the prosecution, both the witnesses are injured witnesses and they are witnesses of incident and they are nephew and son of the deceased Ranchhodbhai respectively.

12. We have carefully gone through the oral evidence of the above referred two star witnesses of the prosecution along with the oral evidence of Investigating

Officer namely PSI Shri PS Zala - PW 28, oral evidence of PSI Shri AM Malek - PW 27 and also oral evidence of the hostile witnesses Hargovan Maharaj, Mohanbhai Ghelabhai and Devubhai because the learned trial judge has partly relied upon the evidence of the hostile witnesses and come to the conclusion that they are also witnesses of previous incident.

13. On going through the arguments advanced by the learned counsel for the respective parties and from the record and proceedings of the case, the following facts emerge which are practically undisputed namely that the deceased and the accused are having their agricultural field adjoining to each other and that there is a Well in the field of deceased Ranchhodbhai. The said well is of co-ownership of the deceased, accused and other persons and there is a submersible pump on the said well, which also belongs to the deceased. They all were fetching water from the said well on time sharing basis and the accused and others were paying Rs.10/- per hour to the deceased towards the electricity charges.

14. It is also established from the record and proceedings that on the day of incident, the accused were fitting Oil Engine on the said Well which the deceased and his son did not like. Moreover, the incident has taken place in the Sim of Chokadi village, very near to the Paniyali Talavadi. It is undisputed that the death of the deceased Ranchhodbhai is homicidal death and therefore, the question which is required to be taken into consideration is whether the accused are responsible for the death of the deceased or not. For this the learned Sessions Judge has only relied upon the two star witnesses of the prosecution namely PW 1 and PW 2. It is true that both the Prosecution Witnesses are injured and therefore, their presence at the place of incident cannot be doubted. Secondly, merely because they are nearest relatives of the deceased, their evidence cannot be discarded. But great caution should be exercised in accepting the witness when they are interested witness and if their evidence read as-a-whole, appears to have a ring of truth, minor discrepancies or trivial matters should not attach importance and court can rely upon the witnesses. Keeping in mind the above aspects of the matter, we proceed further into the matter. First we would like to discuss the oral evidence of star witness i.e. nephew of the deceased Ranchhodbhai P.W.1, who has lodged the complaint Ex.10 in the Limbadi Hospital which has been recorded by the Head Constable, Limbadi Police Station and the same has been transferred to the Chuda Police Station vide CR NO.0 of 1990 and the same has been

registered with Chuda Police Station as CR NO.I-115 of 1990.

15. As per the complaint all the four accused came and they started beating Ranchhodbhai Virabhai and the complainant. He has not described any independent role played by the accused, in the FIR. But he has stated that Ishvar Dana was having Dhariya and Dhiru Dana was having stick, whereas as far as the injury is concerned, he has described that Daya Dana has given Spade Blow on his head as a result of which he fell down and received injury on his right hand. He has not involved the other accused into the crime in question. Whereas as per the injury of Laljibhai is concerned, he has stated that Dana Mansing - accused No.1 was having axe in his hand, and he has given axe blow and Daya Dana - accused No.2 has given Spade blow to Laljibhai, so in the case of Laljibhai he has not involved the accused Nos.3 and 4.

16. In the same way he has not stated anything regarding the injury of Daya Dana - accused No.2 and also he has not stated anything regarding the dispute of fetching water and regarding the earlier incident which alleged to have taken place during the course of day on which the incident in question has happened, and also not stated anything regarding the presence of Hargovan Maharaj and Mohan Ghela, either in the first incident or in the incident in question, on all the above issues, the FIR is silent, whereas as per the oral evidence before the court, he has deposed that Dana Mansing - accused No.1 has given blow in between the Cheek and Ear of the deceased and Daya Dana accused No.2 has given Spade Blow on the head of the deceased Ranchhodbhai Virabhai. So he has not involved the other two accused for the alleged injury to the deceased Ranchhod Virabhai whereas, the involvement of Daya Dana accused No.2 regarding the Spade Blow is concerned, there is improvement, which he has not stated in the FIR. In the same way, before the court he has deposed that Daya Mansing has given axe blow. So far as his own injury is concerned, he has deposed that Ishvar Dana - accused No.3 has given him Spade Blow but in para 11 of his cross examination, he has admitted that the accused No.2 - Daya Dana has given Spade blow. So there are material contradictions on this issue. In chief examination, he has tried to involve Ishvar Dana accused No.3, whereas in the cross examination he has stated that the said blow has been given by Daya Dana accused No.2. In the same way, when the specific question was asked to him if the police had recorded his additional statement on 18/11/1990, he has categorically denied the same in para 11 of the cross examination. But

the PSI Shri Zala has admitted in his evidence that he has recorded the further statement of Bhagvanbhai on 18/11/1990. So his evidence is far away from truth and he has deposed to the extent that his further statement has not been recorded and as per his further statement, he has stated that the accused NO.3 has given spade blow. Even in his further statement, he has categorically deposed that by way of mistake he has given the name of the accused in the FIR and he has also admitted that at the time of giving the FIR he was fully conscious. As per his evidence before the Court he has stated that the accused No.2 was having Dhariya whereas as per the complaint the accused No.3 was having Dhariya. So his evidence on the material aspect are such that no prudent man can accept and the same is not trust-worthy and there are contradictions, omissions and improvements.

17. In the same way we have minutely and carefully evaluated the oral evidence of the star witnesses i.e.Lalji Ranchhod who happens to be the son of the deceased Ranchhodbhai Virabhai and Bhagvanbhai and there are material contradictions,, omissions and improvements between him and the evidence of Bhagvanbhai and in the FIR. In his evidence, he has stated that when they were standing near the scene of offence, the accused came and without speaking anything, started beating Ranchhodbhai Virabhai, whereas as per the evidence of Bhagvanbhai, there was an exchange of word, before the incident occurred. So far as Ranchhodbhai Virabhai's injury is concerned, he has stated that the accused No.1 - Dana Mansing has given axe blow on the neck of his father, Dayabhai Danabhai accused No.2 has given Dhariya blow on the neck and eye of his father, Ishvar Dana - accused No.3 has given spade blow on the head of his father and Dhiru Dana accused No.4 has given stick blow on the head of his father Ranchhodbhai. Whereas as per the deposition of the Bhagvanbhai, the present witness, Daya Dana - accused No.2 was having spade in his hand and Ishvar Dana accused No.3 was not having Dhariya in his hand and on this point, there is a material contradiction in the evidence of Bhagvanbhai and Laljibhai also, and Laljibhai has stated in his evidence that Dana Mansing accused No.1 has given axe blow. Whereas, he has admitted that he has not stated the said fact to the investigating officer, when his statement was recorded by him, so it is nothing but the improvement on the part of the witness. In the same way, Bhagvanbhai has not deposed that Dana Mansing accused No.1 has given axe blow to Lalji Ranchhod, so the evidence of both the star witnesses are contradictory to each other and FIR also, and there are improvements and omissions on their part.

18. So far as the injury of complainant is concerned, Laljibhai has deposed that Ishvar Dana - accused NO.3 has given Spade blow on the head of the Bhagvanbhai and Dhiru Dana - accused No.4 has given stick blow on the elbow of Bhagvanbhai, whereas as per the FIR, Daya Dana accused No.2 has given spade blow to Bhagvanbhai and name of the Dhiru Dana- accused No.4 has come out for the first time in the deposition of the present witnesses in the court and he has admitted that the said facts have not been stated by him to the police and the Investigating Officer has also admitted the same. So by way of this evidence, he has tried to falsely involve both the accused into the crime in question, though it has not been stated before the investigating officer.

19. Even PSI Shri Zala has also admitted in his oral evidence in para 10 that Lalji Ranchhod has not stated before him that Dana Mansing - accused NO.1 has given two axe blows on his head and has also not stated that Ishvar Dana - accused NO.3 has given spade blow on the head of Bhagvanbhai. In the same way, it has not been stated by him that Dhiru Dana - accused No.4 has given stick blow on the elbow of Bhagvanbhai and on the head of Ranchhod Vira. It has also been admitted by PSI Shri Zala that he has not stated before him that his father had told accused No.1 that it was his turn to fetch water and why he has started Engine and it has also been admitted by Shri Zala that he has not stated before him that there was exchange of words into the field between his father and Daya Dana - accused No.2, and ultimately, the same was resulted into the scuffle and during that scuffle Daya Dana - accused No.1 fell down and he received injury on his head. So in short the evidence of the said two injured witnesses are not trust-worthy. They have tried to falsely involve the accused in the crime in question and therefore reliance cannot be placed upon the two star witnesses of the prosecution for the purpose of proving the guilt of the accused. Conviction on the basis of the above two witnesses is required to be altered.

20. In the same way there was a delay in filing the FIR, which was tried to be explained by the prosecution by examining an Un-Armed Police Constable of Limbadi Police Station namely Bhagvatsinh Dilubha Rana and Head Constable Dhanjibhai Hirjibhai and according to the said Head Constable Dhanjibhai Hirjibhai, his duty was fixed into the Limbadi Court and when he returned to the Police Station at night at 8.30, the PSO of Limbadi Police Station had handed over him the complaint Ex.10 for submitting to the Chuda Police Station, because the

incident has taken place within the jurisdiction of Chuda Police Station. Therefore, first he went to Limbadi-gate and he waited for vehicle, but as he could not get any vehicle, he went back to his home and took a bicycle and went on bicycle from Limbadi to Chuda and reached Chuda at 3.00 a.m. This witness has been examined by the prosecution to explain the delay but the evidence of Dhanjibhai Harjibhai is such that no prudent man can accept it. More particularly, when the offence of murder has been taken place and in that incident, two persons have been injured and the complaint to that effect has been lodged and when all the Police Stations are having their vehicle in their control, then they will not leave the FIR in such a manner that ultimately, the Head Constable has to take Bicycle from his house and to go on Bicycle from Limbadi to Chuda, which is of 18 KM. away from Limbadi. This explanation is not probable, and not believable. The learned Sessions Judge has wrongly come to the conclusion that delay has been properly explained.

21. The prosecution has failed to prove the recovery panchnama and discovery panchnama, panchnama of scene of offence and other panchnamas. All the panch witnesses of the prosecution have turned hostile and they have not supported the case of the prosecution. Therefore naturally the prosecution had to rely on the evidence of investigating officer. Here in the present case as per the case of the prosecution, as the investigating officer - PSI Shri Zala was transferred during the course of the investigation, he could not complete the investigation and hence he handed over the investigation to PSI Shri Vagh, but admittedly the prosecution has not examined PSI Shri Vagh. The prosecution has relied upon the evidence of Investigating Officer - PSI Shri Zala for the purpose of proving the recovery, discovery and other panchnamas. We have carefully gone through the evidence of PSI Shri Zala and from his oral evidence it has been established that through the evidence of PSI Shri Zala, the prosecution is not able to prove any panchnama because so far as the discovery panchnama is concerned, both the panchas have deposed that the panchnamas have not been prepared in their presence, but they have signed the Panchnama in the Panchayat Office. Not only that but both the panch witnesses have not signed the Panchnama simultaneously also. It is further deposed by them that at that time, both the accused were present there, but as per the Arrest Panchnama, the accused No.2 was arrested on 28/11/1990 and the accused No.3 was arrested on 21/11/1990, and hence the presence of all the accused could not be possible at that time. Whereas the PSI Shri Zala is not sure about the discovery panchnama Ex.27 and

as per his evidence, it is not the discovery panchnama but it is a recovery Panchnama and he has categorically deposed in his cross examination that he does not know what he has done after calling the Panchas. Not only that but his evidence is also contrary to the evidence of the Panchnama Ex.29 because as per his own evidence the weapon has been recovered from the back side of the house of the accused No.1 known as VADA, whereas the Panchnama and panchas say otherwise. Therefore the discovery panchnama Ex.29 has also not been proved. In the same way as per the case of the prosecution, Panchnama Ex.31, is a discovery panchnama, though the Panch witness Ex.12 Raghubhai has supported the say of the prosecution, but ultimately he has admitted in his cross examination that the alleged discovery panchnama has been prepared in the Panchayat Office and at that time, the alleged weapon i.e. Stick was lying in the office of the Panchayat and the accused were present there with hand cuffing, so the question of discovery or recovery panchnama does not arise. In the same way, so far as the discovery Panchnama of Dhariya Ex.41, from the accused No.2, is concerned, the Panchas of discovery Panchnama Ex.41 have also not supported the case of the version of the panchnama and they have deposed that Dhariya was lying on the table of the Panchayat office and they have only signed the ready made Panchnama, whereas the PSI Zala has not stated anything about the Panchnama Ex.41 except that the Panchas have signed in his presence. So at the most, the signature of the Panchas have been proved through the evidence of the said PIS Shri Zala, because the Panchas have not denied the same but the contents of the Panchnama have not been proved by the prosecution through the PSI Shri Zala. In the same way, it has also been reflected from the Panchnama of Scene of Offence Ex.25 that the Spade was lying at the scene of offence, but PSI Zala has not deposed that he has seized the said Spade, the panchnama Ex. 25 also does not reflect that the said Spade has been seized by the Investigating Officer. But without following any procedure, the Spade has become a part of the Muddamal and PSI Shri Zala in turn has admitted that all the weapons which alleged to have been recovered, from the accused are having not any mark of blood stains or any notable mark, according to the FSL report also. So in short, though the prosecution has relied upon the discovery panchnama and recovery panchnama through the evidence of PSI Shri Zala, the said evidence is not trust worthy and the prosecution has not been able to prove the same through the evidence of PSI Shri Zala, the Panchas have also not supported, if all the weapons have been used in the commission of offence, there must be blood mark or any other notable marks on

the weapons. But there are no blood marks or any notable marks on the weapons. In short the prosecution has failed to prove the discovery and discovery Panchnamas and therefore the prosecution has failed to get any support from the above Panchnamas.

22. In the same way, it has been established from the record and proceedings and from the Medical Certificate and oral evidence of the Doctor PW 14 that the appellant original accused No.2 -Daya Dana has been injured and first he has been taken to the Chuda Hospital and thereafter, looking to his injury, he has been shifted to Surendranagar Hospital, which has been proved through the oral evidence of Dr. Jaysesh Champaklal PW 14, Certificate Ex.38 and treatment Sheet Ex.39. It is established form the above evidence that the accused No.2 was treated in the Chuda hospital and thereafter he has been shifted to Surendranagar Hospital, where he was admitted from 17/11/2990 to 28/11/1990 as an indoor patient. It is also established from the evidence on record that the physical condition of the accused No.2 was not good, his Pulse, and Blood Pressure were not normal and he was drowsy and therefore the Doctor has taken endorsement of the brother of the accused NO.2 that the condition of the patient is serious and to that effect they have been informed by the Doctor and if anything will happen to the accused No.2, the Doctor, and the Staff of the Hospital, will not be held responsible which itself indicates that the physical condition of the accused No.2 was very serious. In view of the above facts and circumstances, the conclusion of the trial court that the injury received by the accused No.2 - Daya Dana is simple one, is not a correct conclusion. As we have discussed above, the accused NO.2 had received injury on vital part of his body i.e. on his head, which is caused by the hard and blunt substance and the physical condition of the accused No.2 was so serious that he had to be admitted in the hospital for 12 days as an indoor patient. The conclusion of the trial court that his injury was simple and therefore the prosecution is not bound to explain the same, is not correct. In view of the above discussion, when the accused No.2 has received such serous injury, the prosecution ought to have explained the injury received by the accused NO.2, and in absence of such explanation, the benefits must go in favour of the accused.

23. Secondly, the learned trial judge has come to the conclusion that Daya Dana accused NO.2 had received the injury in the earlier incident and not in the incident in question, but as discussed hereinabove, that FIR EX.10 is

very clear and in the said FIR nowhere it has been stated by the complainant that there was any early incident, which has taken place in the field. Not only that but even the name and presence of Hargovan Maharaj and Mohan Ghela have also not been reflected from the FIR, so even the presence of the above independent two witnesses has not been established, Hargovan Maharaj and Mohan Ghela have also not supported the say of the prosecution. In such circumstances, the prosecution has failed to establish the first incident and therefore, the trial court's conclusion that Daya Dana - accused No.2 has received the injury in the previous incident is not correct but the accused NO.2 has received the injury in the incident in question. After scrutinising the whole evidence on record it has been established that this is a case of free fight wherein accused No.2 has received the injury along with the other persons. It has also been established that the complainant and others were waiting for the accused near Paniyali Talavadi i.e. scene of offence and it has also been established that the accused were coming on their bicycle from their field and they had been intercepted near the scene of offence which is established from the panchnama of scene of offence, because there was a Bundle of Fire-wood on the bicycle along with the empty lunch box. So, the case of the prosecution that the accused had come with deadly weapon has also not been proved, and Hargovan Maharaj and Mohan Ghela have also not supported the case of the prosecution. Not only that but blood stains on the weapons were also not found. Moreover, it has been admitted by Laljibhai Bhagvanbhai that the land in question was of the ownership of Laljibhai and it has been given to Mohanbhai Ghelabhai for the purpose of cultivating the same on crop sharing basis and therefore, it was not necessary for the complainant and others to go to the field every day because it is the duty of Mohan Ghelabhai to look after the affairs of the field, as he was cultivating the said land on crop sharing basis, and he was only entitled to his share only and not required to look after the affairs of the field. It has also been established from the record that the accused were not having any separate facility for fetching water from the said Well which was of the co-ownership and they were fetching the water from the Submersible pump of the complainant, and as admitted by Laljibhai, they had stopped to give water to the accused since 8 to 10 days and when their crops were standing, they had decided to fit Oil engine on the said Well, which was objected by the complainant and therefore, just to teach them a lesson, complainant and others were waiting near Paniyali Talavadi and the incident in question happened.

Therefore certainly we come to the conclusion that the complainant's side were the aggressors and it is nothing but free fight. As we have discussed above, there are material contradictions, improvements and omissions on the point of use of weapons and injury. The oral evidence of both the witnesses are also contrary to each other; even it does not tally with the medical evidence and the weapons in question. As far as the accused No.4 is concerned, except mere presence of accused No.4, nothing has been established. Laljibhai P.W. 4 has deposed in his evidence that accused NO.4 Dhirubhai Danabhai has also given stick blow to the deceased, but ultimately, he has admitted in his cross examination that the said fact that he has not stated this fact in his statement before the police. Whereas the complainant has not stated anything regarding the role played by the accused NO.4, and even as established from the record and proceedings and from the FSL report that no blood stains has been found from any weapons seized by the Police as Muddamal which alleged to have been recovered from the accused. If the weapons would have been used in the manner in which it has been stated by the prosecution, then the presence of the blood stains must be there.

24. The prosecution has also tried to get corroboration on the assumption and presumption, though there is no evidence on record that there was a first incident which has taken place, wherein Daya Dana accused No.2 received injury on his head and as per the finding of the trial court, they waited till evening and the accused Daya Dana - accused NO.2, had decided to take revenge and therefore they came with deadly weapons and they were the aggressors, but the fact which is established is otherwise. It has been established from the record and proceedings that the accused were returning to their home on their Bicycle along with bundle of firewood, empty box etc., and at that point of time, the complainant, his uncle Ranchhod, the son of the Ranchhodbhai, Hargovan Maharaj and Mohan Ghela were waiting there and as soon as the accused came, they all started quarrel and so in our opinion the present complainant side were aggressor. This is nothing but the free fight between the parties wherein even the Daya Dana - accused NO.2 has received serious injury on the vital part of his body i.e. on his head, which has not been established by the prosecution.

25. In view of the above facts and circumstances, in our opinion, the prosecution has failed to prove the guilt against the appellants - original accused beyond reasonable doubt and there are vital contradictions,

omissions and improvements would stand in the way of conviction and the appellants - original accused are entitled benefit of doubt; and hence the judgement and order passed by the trial court is required to be quashed and set aside and the appellants are required to be acquitted.

26. As per the say of the learned counsel for the appellants, the appellant No.1 original accused No.1, has already been pardoned and released by the State Government considering his old age on the celebration of Silver Jubilee Year of Independence.

27. In the result, this appeal is allowed. The judgement and order passed by the learned Sessions Judge, Surendranagar, dtd.14th October, 1991 in Sessions Case NO.27 of 1991 is hereby quashed and set aside. The conviction and sentence imposed on appellant Nos.1 to 4 by the learned Sessions Judge, Surendranagar in Sessions Case NO.27 of 1991 is hereby quashed.

The appellant Nos. 1 to 4 - original accused Nos.1 to 4 namely [1] Dana Mansing [2] Daya Dana [3] Ishvar Dana and [4] Dhiru Dana are ordered to be released forthwith if they are not required in any other case. Fine if paid be refunded to the appellants. Muddamal be disposed in terms of the impugned judgement and order.

(M.H. KADRI, J.)

(R.P. DHOLAKIA, J.)

Rafik